IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.* W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, *et al.*	)	
Plaintiffs	)	
vs.	)	05-CV-00329-GKF-PJC
TYSON FOODS, INC., *et al.*	)	
Defendants	)	

REPLY OF CAL-MAINE FOODS, INC.
IN SUPPPORT OF ITS MOTION *IN LIMINE* REGARDING
REFERENCE TO BENTON COUNTY FOODS, LLC [Dkt. No. 2409]

In its response to the *in limine* motion by Cal-Maine Foods, Inc. ("Cal-Maine") regarding reference to Benton County Foods, LLC ("BCF"), the plaintiff has not denied the truth of the factual allegations made by Cal-Maine in its motion. Those facts catalog and demonstrate the separate and distinct identities of Cal-Maine and BCF. Importantly, the plaintiff also does not dispute that it has been aware of the existence BCF since approximately June of 2007, and that despite this knowledge the plaintiff has elected not to bring BCF into this case as a defendant.

On the other hand, the allegations of fact made by the Plaintiff do not support the plaintiff's argument that there is some flaw in the veil between Cal-Maine and BCF. The only material facts relied upon by the Plaintiff for its arguments are that Cal-Maine owns

BCF and that the directors of BCF are also directors of Cal-Maine.[1] It is, of course, common practice for there to be some commonality of directors between a parent company and a subsidiary. As recognized in United States v. Best Foods, *et al.*, 524 U.S. 51, 60-61 (1998), "it is 'normal' for a parent and subsidiary to 'have identical directors and officers'", and that "that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." The Court further expressly recognized the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *Id.* at 61.

Some of the other factual allegations made by the Plaintiff in its response are either ambiguously stated or are simply incorrect. For instance, the plaintiff alleges that Cal-Maine "provides" BCF with all its chicks. (Res., p. 3) This allegation is misleading as stated. The affidavit of Tim Dawson (Motion Ex. 5) explains that BCF purchases its chicks from Cal-Maine. The sale of chicks does not amount to any comingling of assets as the plaintiff's wording tends to suggest.

The plaintiff also alleges that "many Cal-Maine executives serve in similar executive capacities for BCF." (Res., p. 3, emphasis added) This is an overstatement. Beside the three common directors, there is only one Cal-Maine employee who has any meaningful oversight responsibility for BCF. That person is Steve Storm. As shown in his affidavit (Motion Ex. 2) Mr. Storm is a Vice President for Operations for Cal-Maine. He has oversight responsibilities for operations in four states. He visits BCF approximately six times per year

[1] It does not appear in the record, but Cal-Maine represents to the Court that the three BCF directors are presently Fred Adams, Dolph Baker, and Tim Dawson. These three individuals are also three of the eight directors of Cal-Maine.

"to observe, and to the extent necessary, superintend" the egg production at BCF.[2] Best Foods addresses precisely this sort of arrangement. The Court explained that "activities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance . . . should not give rise to direct liability." *Id.* at 72. Storm's affidavit makes it clear that his responsibilities with regard to BCF are of the sort the Supreme Court envisioned as being consistent with the principle of proper separation between parent and subsidiary companies.[3]

The Plaintiff devotes much of its response to the notion that Cal-Maine has improperly cited Best Foods because Best Foods is a CERCLA case and the present case no longer has a CERCLA component. The point of Best Foods, however, was to teach that CERCLA does not create any special exceptions to the ordinary common law principles which apply to the issue of potential parent liability. In explaining that no special exception applies in CERCLA cases, the Supreme Court explained what those common law principles are. The facts in Best Foods, and the Supreme Court's application of the law to those facts, greatly inform the issue in the present motion. That is the reason Best Foods is relied upon, and that is the reason Best Foods is instructive. As Steve Storms affidavit (Motion Ex. 2) establishes, the BCF directors, wearing their BCF hats, established the manure arrangements for BCF. Cal-Maine did not. Steve Storm does not oversee or superintend the handling of

[2] The Plaintiff's characterization of Storm's responsibilities misstates them. The Plaintiff, at page 5 of its response, states that Storm is "is responsible for supervision and oversight of BCF's egg production activities . . ." Storm's affidavit (Motion Ex. 2) states plainly that a BCF employee, Tim Kimball, is responsible for the day-to-day activities at BCF, and that Storm visits BCF approximately six times a year, and superintends the production of eggs, care of birds, and maintenance of the physical plant only "to the extent necessary." The Plaintiff's implied suggestion that Storm's limited supervision is somehow more absolute and constant is not correct.

[3] In addition, the Plaintiff states at page 5 of its response that Cal-Maine left the IRW in 2005-2006. The reality, as shown at the preliminary injunction hearing, is that Cal-Maine left the IRW in January, 2005. BCF was formed by Cal-Maine and other unrelated partners in approximately April of 2007.

manure at BCF. Under the common law principles explained in Best Foods, Cal-Maine can have no liability for BCF manure.

The Plaintiff cited the Oklahoma cases Frazier v. Bryan Memorial Hospital Authority, 775 P.2d 281 (Okla. 19890, and Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 61 P.2d 645 (Okla. 1936) for general, and familiar, common law principles relating to parent/subsidiary liability. The cases say what the Plaintiff says they say, but applying Frazier and Wallace to the facts of the present case does not take the Plaintiff where it wants to go. An examination of the list of facts used by the plaintiff (Response, p. 4), makes this clear. The first two facts on the list, (a) and (b), have changed in favor of the Plaintiff, *i.e.* Cal-Maine now owns 100% of BCF, and all three of the BCF directors are also directors of Cal-Maine. The effect of this is still nil as shown by Best Foods. Fact (c), the allegation that Cal-Maine created BCF to acquire George's Inc.'s former egg production in the IRW is partially true (Cal-Maine and an unrelated partner formed BCF), but it is meaningless in the context of this motion. Fact (d), the allegation that Cal-Maine is the sole provider of chicks to BCF, is conditionally correct as shown earlier, but it is also meaningless. Fact (e), the allegation that Cal-Maine stores and has access to all of BCF's electronic business records at Cal-Maine's home office in Jackson, MS is correct but meaningless. Fact (f), the allegation that Cal-Maine's stated goal is to grow through acquisitions is correct but meaningless. Fact (g), the allegation that Cal-Maine files consolidated financial statements which contain information regarding subsidiaries is correct but meaningless. Fact (h), the allegation that Steve Storm "is responsible for supervision and oversight of BCF's egg production activities which include 'care of the birds and maintenance of the physical plant'" is partially correct as shown above in footnote 2, but is also meaningless as demonstrated by Best Foods.

Also, the Plaintiff cites Fed.R.Civ.P. 65(d)(2)(C) for the proposition that BCF would be bound by any injunction this Court might enter. This is not correct, and the Plaintiff cites no case authority for the argument. The cited Rule provides:

> The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Even presuming that an order of injunction is ultimately granted against Cal-Maine, and assuming further BCF is served with actual notice of the order, the rule would not apply to BCF as it is a separate, stand-alone company which is not in active concert or participation with Cal-Maine. Relevant "active concert or participation" would necessarily only apply to the handling of manure. The Storm affidavit (Motion Ex. 2) shows clearly that the BCF manure handling policy is set by the BCF directors. The directors of BCF, notwithstanding that they are also Cal-Maine directors, wear their BCF hats when they determine manure handling policy. There is no proof of any nature that the BCF manure handling policy is controlled by Cal-Maine, or that it is or was created or is operated in "active concert or participation" with Cal-Maine.

Lastly, the Plaintiff cites Natural Resources Defense Counsel, Inc. v. Texaco Refining and Marketing, Inc., 2F.3d 493 (3rd Cir. 1993) for the proposition that any injunctive order against Cal-Maine would apply to BCF because, according to Plaintiff's hypothesis, BCF is a "successor in interest" to the Cal-Maine IRW operations that ended in January, 2005. This argument fails on the facts. The Cal-Maine operation in the IRW was based largely on contracts with independent contract growers. BCF has no connection

whatsoever with any of those growers or any other aspects of Cal-Maine's operation in the IRW. The BCF operation consists of eight BCF-owned layer houses contained in a discrete complex, and a few leased pullet houses that are separate from the layer complex. None of these layer or pullet houses was ever associated in any manner with Cal-Maine during the time Cal-Maine had a presence in the IRW. The successor-in-interest argument fails, and Natural Resources is, accordingly, inapposite.

Conclusion

The simple reality is that BCF is a separately operated non-party company which happens to be owned by Cal-Maine. It is plain that under all cases cited by both the Plaintiff and Cal-Maine, Cal-Maine cannot be held liable for the manner in which BCF handles the manure that is generated at the BCF houses. The Plaintiff made its calculated choice not to bring BCF into this litigation as a defendant. BCF is not a part of this action, and reference to BCF can serve no purpose other than to prejudice Cal-Maine. The Motion should be granted.

Respectfully submitted,

CAL-MAINE FOODS, INC. and
CAL-MAINE FARMS, INC.

by: s/ Robert E. Sanders

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CERTIFICATE OF SERVICE

I certify that on the 28th day of August 2009, I electronically transmitted the attached document to ECF registrants via the Court's ECF system:

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So Certified, this 28th day of August, 2009.

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